

The African Justice Cascade and the Malabo Protocol

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Abstract

This article argues that the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) reconceptualizes the idea of transitional justice mechanisms as varying approaches meant solely to address the legacy of abuse in one nation, and proposes that transitional justice mechanisms can also encompass regional and transnational efforts to respond to mass human rights violations. It also argues that the Protocol seeks to correct for perceived biases in international criminal justice. The article illuminates the ways in which the Protocol builds on the justice cascade. It provides a brief overview of the domestic, hybrid and international criminal trials in Africa that have informed the development of the regional court, and argues that the Malabo Protocol offers the Continent an important, alternative vision of regional criminal justice. The article concludes that the regional court could arguably tailor criminal accountability to the context, needs and aspirations of the Continent.

INTRODUCTION

The African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) in May 2014,

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which, if ratified, will create the first-ever regional criminal court (RCC).¹ In this article, I argue that the Protocol is a development that could reshape the ‘justice cascade’ in beneficial ways.² The justice cascade is a metaphor that Kathryn Sikkink used to describe the spread of accountability systems throughout the globe. Yet, much of that project focused on the spread of prosecutions in Europe and Latin America. The African experience with justice mechanisms challenges the narrative of a unidirectional ‘cascade’ toward holding individual state officials, including heads of state, criminally accountable for human rights violations.

While the Protocol is part of the increasing resort to criminal trials to address mass violence, it also challenges the gaps in existing models of accountability. First, it re-conceptualizes transitional justice from varying approaches meant solely to address the legacy of abuse in one nation, and instead proposes that it can also encompass regional efforts. Second, by shifting the locus and the gaze, the Protocol seeks to limit the utilization of international criminal law (ICL) to advance the interests of powerful states in the Global North and to counteract perceived biases. The Protocol allows us to think more creatively about what the ‘justice cascade’ could look like – the types of claims, actors covered, as well as the appropriate levels of adjudication.

Literature assessing the Protocol is emerging. Yet, much analysis concentrates on questions of doctrinal compatibility between the RCC and the Rome Statute of the

¹ ‘Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,’ AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) [hereinafter ‘Malabo Protocol’]. The AU Assembly adopted the Malabo Protocol on 30 June 2014 at its 23rd Ordinary Session. See, AU Doc. No. Assembly/AU/Dec.529 (XXIII).

² For a discussion of the spread of criminal trials, see, Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: WW Norton & Company).

International Criminal Court (ICC).³ Conventional wisdom on the Protocol views it as a negative development that works to insulate the 'dictators club' from facing justice.⁴ Accordingly, some view the RCC as undermining key gains.⁵

I argue that the Protocol offers the Continent an important, alternative vision of regional criminal justice. In the remainder of this article, I first provide context on the RCC before giving an overview of the domestic, hybrid and international criminal trials in Africa that have informed the emergence of the RCC. I then discuss how a regional approach could arguably tailor criminal accountability to African realities.

There are numerous political, financial and other obstacles that may impede the RCC's effectiveness, if it comes into existence. It is beyond the scope of this article to address these constraints.⁶ Instead, I seek to demonstrate how the doctrinal innovations in the Protocol potentially reshape important aspects of the justice cascade.

³ See, e.g., Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights,' *Journal of International Criminal Justice* 9(5) (2011): 1067–1088. Murungu contends that the Rome Statute only envisioned domestic trials for complementarity. But see, Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,' *European Journal of International Law* 24(3) (2013): 933–946 for an argument that the Rome Statute is not a hierarchical treaty that precludes states from entering others.

⁴ See, generally, Lutz Oette, 'The African Union High-Level Panel on Darfur: A Precedent for Regional Solutions to the Challenges Facing International Criminal Justice?' in *Africa and the Future of International Criminal Justice*, ed. Vincent Nmeihelle (The Hague: Eleven International Publishing, 2012). Oette argues that the RCC gives license to impunity.

⁵ See, Kristen Rau, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights,' *Minnesota Law Review* 97(2) (2012): 669–708.

⁶ See, Matingai Sirleaf, 'Regionalism, Regime Complexes and the Crisis in International Criminal Justice,' *Columbia Journal of Transnational Law* 54(699) (2016), <http://dx.doi.org/10.2139/ssrn.2293988> (accessed 13 December 2016).

A. THE REGIONAL CRIMINAL COURT

This section discusses the method of creation and structure of the RCC, the crimes covered and the scope of criminal liability under it.

1. Method of Creation and Structure

Regional integration in Africa expanded from human rights to encompass both quotidian criminal law and ICL matters.⁷ Initially, the regional human rights system consisted of the African Charter on Human and Peoples' Rights⁸ and the quasi-judicial African Commission.⁹ The Organization of African Unity created the African Court on Human and Peoples' Rights¹⁰ in 1998 to be the judicial organ for enforcing the African Charter as well as other human rights treaties.¹¹

African states founded the AU with a stronger commitment to human rights.¹² Given its many objectives and enhanced role in maintaining peace and security,¹³ it is unsurprising that the AU created the RCC. Regional integration in criminal matters could

⁷ Cf. Abass, *supra* n 3, for a discussion of criminalizing issues peculiar to Africa.

⁸ 'African Charter on Human and Peoples' Rights,' OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (27 June 1981; entered into force 21 October 1986).

⁹ *Ibid.*

¹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998; entered into force 25 January 2004).

¹¹ Muna Ndulo, 'The African Commission and Court under the African Human Rights System,' in *Africa's Human Rights Architecture*, ed. John Akokpari and Daniel Shea Zimble (Auckland Park: Fanele, 2008).

¹² 'Constitutive Act of the African Union,' 2158 UNTS I-37733 (11 July 2000) [hereinafter 'AU Constitutive Act'].

¹³ *Ibid.*

allow states to respond to common security threats more effectively,¹⁴ because neighboring states have a greater interest in cooperating. For example, the AU is the only institution empowered to intervene forcibly in grave violations of human rights and the only organization that incorporates the responsibility to protect.¹⁵ Additionally, the AU adopted a treaty on democracy, which empowered it to suspend members following an unconstitutional change in government.¹⁶ Moreover, it provided for a court predating the RCC with the ability to prosecute alleged perpetrators.¹⁷

The RCC has a complex history. In 2004, the AU decided to merge the African Court of Justice and the African Court of Human and Peoples’ Rights. In 2008, the AU adopted a Protocol generating the African Court of Justice and Human Rights.¹⁸ In 2014, the AU proposed including the RCC.¹⁹ Under this tripartite court, the RCC will adjudicate ICL violations while the other two chambers will be dedicated to determining international human rights violations and issues of general international law respectively.²⁰ The tripartite court was proposed due to funding concerns and the proliferation of institutions. If it comes

¹⁴ Ricardo Pereira, ‘The Regionalization of Criminal Law: The Example of European Criminal Law,’ in *The Diversification and Fragmentation of International Criminal Law*, ed. Larissa van den Herik and Carsten Stahn (Leiden: Martinus Nijhoff, 2012).

¹⁵ AU Constitutive Act. See also, Abdulqawi A. Yusuf, ‘The Right of Forcible Intervention in Certain Conflicts,’ in *The African Union: Legal and Institutional Framework – a Manual on the Pan-African Organization*, ed. Abdulqawi A. Yusuf and Fatsah Ouguergouz (Leiden: Martinus Nijhoff, 2012).

¹⁶ See, ‘African Charter on Democracy, Elections and Governance,’ AU Doc. Assembly/AU/Dec.147 (VIII) (30 January 2007; entered into force 15 February 2012).

¹⁷ Ibid.

¹⁸ ‘Protocol on the Statute of the African Court of Justice and Human Rights,’ <http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf> (accessed 13 December 2016) [hereinafter ‘Merger Protocol’]. Five countries ratified, but 15 were required.

¹⁹ Malabo Protocol.

²⁰ Merger Protocol.

into being, the RCC will have a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.²¹ The Protocol requires 15 ratifications before it can come into force; to date only nine states have signed it.²² Yet, treaty ratification is a lengthy process.

Under the tripartite structure, ICL issues may not be marginalized as states submit to judicial oversight from the other chambers and the larger Court gains credibility. Conversely, this assessment may seem sanguine given the experience of continental sub-regional bodies.²³ However, competitors like Nigeria and South Africa may impede the ability of one hegemon to capture proceedings. Nevertheless, there is always the danger of powerful states exercising undue influence.

Indeed, ICL courts suffer from the impression that political concerns predominate over criminality considerations.²⁴ While most efforts have had significant UN or Permanent Five (P5) member of the UN Security Council (UNSC) involvement,²⁵ the Protocol departs from this. Instead, the Assembly of the Heads of State and Government, and the Peace and Security Council of the AU, as well as state parties and the independent

²¹ Malabo Protocol.

²² See, African Union, 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' http://www.au.int/en/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf (accessed 12 December 2016).

²³ See, e.g., Tendayi Achiume, 'Dissonance, Judicial Lawmaking, the Authority of International Courts: Lessons from SADC,' in *The Authority of International Courts*, ed. Karen Alter, Laurence Helfer, and Mikael Rask Madsen (Oxford University Press, forthcoming 2017); Frederick Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction,' *Human Rights Law Review* 13(1) (2013): 153–166.

²⁴ See, Peter Stoett, 'Justice, Peace, and Windmills: An Analysis of "Live Indictments" by the International Criminal Court,' in *Trials and Tribulations of International Prosecution*, ed. Henry Carey and Stacey Mitchell (Lanham, MD: Lexington Books, 2013).

²⁵ See, 'Statute of the Special Court for Sierra Leone,' 2178 UNTS 138 (12 April 2002) [hereinafter 'SCSL Statute']. See also, S/Res/1315 (14 August 2000).

prosecutor²⁶ can submit cases to the RCC.²⁷ As such, the RCC may be less likely to reproduce geopolitical hierarchies between the Global North and South.

The RCC could potentially address charges of a foreign institution imposing its will. The sensitivities to Western intervention, given the experiences of slavery, colonialism and neocolonialism,²⁸ may allow the RCC to operate with less perceived baggage. However innocuous their operations, global institutions are not always optimal and different regions may have particularities that cannot be penetrated. The RCC may achieve a balance between the local and the international with the former being too close and susceptible to political capture by powerful elites, and the latter being too remote and subject to geopolitics.

2. Crimes Covered

Historically, the field of ICL has been preoccupied with crisis. The Protocol disrupts this pattern.²⁹ While reaffirming jurisdiction over 'core' international crimes (genocide, war crimes, crimes against humanity and aggression),³⁰ the Protocol expands criminal liability

²⁶ Malabo Protocol.

²⁷ Ibid.

²⁸ See, Henry Richardson, 'African Grievances and the International Criminal Court: Issues of African Equity under International Criminal Law,' in *Africa and the Future of International Criminal Justice*, ed. Vincent Nmeielle (The Hague: Eleven International Publishing, 2012).

²⁹ See, e.g., 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,' UN Doc. A/CONF.183/13 (Vol. III) (15 June–17 July 1998), part 2(F)(3) art. 5, citing drug trafficking and terrorism as potential ICC crimes. Cf. 'Rome Statute of the ICC,' 2187 UNTS 90 (17 July 1998), art. 5 [hereinafter 'Rome Statute'] with Malabo Protocol, arts. 28G (criminalizing terrorism), 28K (criminalizing trafficking in drugs).

³⁰ Malabo Protocol, arts. 28B (genocide), 28C (crimes against humanity), 28D (war crimes), 28M (crime of aggression), with Rome Statute, art. 5 (enumerating the same crimes). For jurisdiction over genocide, crimes against humanity and war crimes, see also, 'Statute for the International Criminal Tribunal for Rwanda,' UN Doc. S/Res/955 (8 November 1994) arts. 2–4 (jurisdiction over genocide, crimes against humanity and war crimes) [hereinafter 'ICTR Statute'].

to trafficking in humans, drugs and hazardous waste, piracy, terrorism, mercenarism and corruption, among others. By straddling quotidian and crisis crimes, the Protocol destabilizes ICL's hierarchy, reflecting both the background and foreground of violations. It recognizes that massive atrocities do not take place in a vacuum, but instead are embedded in systems of criminality.³¹

Unsurprisingly, most of the Protocol's provisions concern common security threats.³² The inclusion of security-threatening crimes responds to African realities. For example, African borders are notoriously illusory, which renders these states more susceptible to transnational crimes. Inherited colonial borders have sustained much instability in the region.³³ Furthermore, neglect of borders has contributed to criminality, making these areas susceptible to insurgents and terrorist groups.³⁴ For example, West Africa is especially vulnerable to cross-border criminal activities.³⁵ In the Great Lakes sub-region, the proliferation of light weapons has fueled conflicts.³⁶ In the East African sub-region, the spate of terrorist attacks from neighboring Somalia has rendered Kenya

³¹ For a discussion of challenges addressing mass criminality, see, Lars Waldorf, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice,' *Temple Law Review* 79(1) (2006): 1–87.

³² See, e.g., Malabo Protocol, art. 28L*Bis*, criminalizing exploitation of natural resources; Sébastien Porter, 'The Exploitation of Natural Resources and Land Grabbing,' *Africa Europe Faith and Justice Network*, <http://www.aefjn.org/index.php/370/articles/the-exploitation-of-natural-resources-and-land-grabbing.html> (accessed 13 December 2016).

³³ See, Francis Nguendi Ikome, 'Africa's International Borders as Potential Sources of Conflict and Future Threats to Peace and Security,' Institute for Security Studies Paper No. 233 (May 2012).

³⁴ See, 'African Union Leaders Look to Enhance Terror Fight,' *Telesur*, 3 September 2014, <http://www.telesurtv.net/english/news/African-Union-Leaders-Look-to-Enhance-Terror-Fight-20140903-0056.html> (accessed 13 December 2016).

³⁵ See, Prosper Addo, 'Cross-Border Criminal Activities in West Africa: Options for Effective Responses,' Kofi Annan International Peacekeeping Training Centre Paper No. 12 (May 2006).

³⁶ See, Paul Eavis, 'SALW in the Horn of Africa and the Great Lakes Region: Challenges and Ways Forward,' *Brown Journal of World Affairs* 9(1) (2002): 251–260.

particularly exposed.³⁷ Because many conflicts and transnational crimes in Africa tend to have a contagion effect, the RCC may be the best-placed institution to address this phenomenon.

In Malabo, African states decided to expand the number of crimes deserving regional, if not international, attention.³⁸ While not all the Protocol's provisions reflect a security nexus,³⁹ it certainly reproduces the trend of turning to criminal trials to resolve complex political problems. Yet, because the RCC's expansion of criminal liability could lead to greater normative consistency and perhaps deterrence of both quotidian and crisis crimes, it renders the justice cascade more relevant to African realities.

3. Corporate Criminal Liability

The Protocol's provision in Article 46C for corporate criminal liability also renders the justice cascade more pertinent. Virtually no ICL courts have jurisdiction over corporate entities.⁴⁰ Corporate criminal liability was debated during discussions for a permanent court in the 1950s,⁴¹ and also mooted during ICC negotiations in 1998.⁴² Some jurisdictions

³⁷ See generally, Joshua Meservey, 'False Security in Kenya: When Counterterrorism Is Counterproductive,' *Foreign Affairs*, 21 January 2015.

³⁸ Abass, *supra* n 3 at 939, discusses the perception that rejected ICC crimes do not 'constitute international crimes *at all*,' or the perception that proffered crimes were not 'serious' enough'.

³⁹ Malabo Protocol, art. 28I (criminalizing corruption). See also, Sonja B. Starr, 'Extraordinary Crimes at Ordinary Times: International Justice beyond Crisis Situations,' *Northwestern University Law Review* 101(3) (2007): 1257–1314. Starr argues for the prosecution of corruption.

⁴⁰ See, e.g., Rome Statute; ICTR Statute.

⁴¹ See, 'Report of the Committee on International Criminal Jurisdiction,' UN Doc. A/2136 (1952); 'Report of the 1953 Committee on International Criminal Jurisdiction,' UN Doc. A/2645 (1953).

⁴² See, Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference,' in *Liability of Multinational Corporations under International Law*, ed. Menno Kamminga and Saman Zia-Zarifi (Boston, MA: Kluwer Law International, 2000).

allow for it, while others do not, complicating enforcement and preventing speedy treaty making.⁴³ Notably, the Control Council passed laws aimed at punishing corporations after World War II.⁴⁴ While no corporations were actually prosecuted, nothing legally prevented such prosecutions.⁴⁵

The Protocol permits jurisdiction over both natural persons and entities on established bases – consent, territorial, nationality, passive personality and protective principles. This represents a significant advancement of ICL.⁴⁶ The devastating impact of corporate malfeasance in Africa explains this development.⁴⁷ The Protocol could enable African states to respond more effectively to challenges posed by corporations,⁴⁸ thereby transforming the justice cascade.

⁴³ Joanna Kyriakakis, 'Article 46C: Corporate Criminal Liability at the African Criminal Court,' in *The African Court of Justice and Human and People's Rights*, ed. Kamari Clarke and Charles Jalloh (Cambridge: Cambridge University Press, forthcoming 2017).

⁴⁴ See, e.g., Control Council Law No. 57, 'Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front,' in Legal Division, Office of Military Government for Germany, *Enactments and Approved Papers of the Control Council and Coordinating Committee Vol. 8* (30 August 1947); Control Council Law No. 9, 'Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof,' in *Enactments and Approved Papers of the Control Council and Coordinating Committee Vol. 1* (30 November 1945) (providing for corporate dissolution and destruction of infrastructure). See also, Joseph Borkin, *The Crime and Punishment of I.G. Farben* (London: André Deutsch, 1979).

⁴⁵ See, e.g., Tyler Giannini and Susan Farbstein, 'Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights,' *Harvard International Law Journal – Online* 52 (2010): 119–135; Jonathan A. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said,' *Columbia Law Review* 109(5) (2009): 1094–1242; 'The Flick Case,' in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. 6* (1952), 1190–1191 ('no justification for a limitation of responsibility to public officials').

⁴⁶ See, Philipp Ambach, 'International Criminal Responsibility of Transnational Corporate Actors Doing Business in Zones of Armed Conflict,' in *Investment Law within International Law: Integrationist Perspectives*, ed. Freya Baetens (Cambridge: Cambridge University Press, 2013).

⁴⁷ See, e.g., 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo,' UN Doc. S/2002/1146 (2002); 'Final Report of the Monitoring Mechanism on Angola Sanctions,' UN Doc S/2000/1225 (2000); 'Report of the Panel of Experts in Relation to Sierra Leone,' UN Doc. S/2000/1195 (2000).

⁴⁸ See, Kyriakakis, supra n 43.

4. Official Immunity

The Protocol also complicates the unidirectional account of justice cascade enthusiasts. In stark contrast with other ICL courts,⁴⁹ it immunizes any

serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.⁵⁰

This provision refers to official and functional immunities provided under customary international law (CIL). The former pertain to a limited group because of their office, while functional immunities attach to acts performed by state officials in the exercise of their functions.⁵¹ Official immunities have been deemed necessary to maintain international peace and cooperation.⁵²

The main judicial body of the UN, the International Court of Justice (ICJ), held in the Arrest Warrant decision that an official enjoyed immunity from prosecution in foreign national courts under CIL because he was then serving as a foreign minister.⁵³ The ICJ in *dictum* discussed exceptions to CIL immunity which allow for prosecution. One of these is treaty-based jurisdiction.⁵⁴ If only a treaty-based exception to official immunities exists,

⁴⁹ Rome Statute, art. 27 (irrelevance of official capacity for criminal responsibility). See also, ICTR Statute; SCSL Statute; Mark Kersten, 'What Gives? African Union Head of State Immunity,' *Justice in Conflict*, 7 July 2014.

⁵⁰ Malabo Protocol, art. 46A *bis*.

⁵¹ See, Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts,' *European Journal of International Law* 21(4) (2011): 815–852.

⁵² See, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment (14 February 2002) [hereinafter 'Arrest Warrant Case'] (separate opinion by Judges Higgins, Kooijmans and Buergenthal).

⁵³ See, *ibid*. See also, 'Report of the International Law Commission on the Work of Its Sixty-Fifth Session,' UN Doc. A/RES/68/112 (16 December 2013).

⁵⁴ Arrest Warrant Case.

then it is permissible for states to form treaties to the contrary.⁵⁵ If the prohibition on official immunities is a developing norm of CIL, then the Protocol undermines general and consistent state practice necessary for CIL to form.⁵⁶ State practice includes ICL statutes supporting the prohibition.⁵⁷ It also includes the prosecutions of former heads of states – Hissène Habré, Saddam Hussein, Slobodan Milošević and Charles Taylor. Yet, these prosecutions took place after they left office, although the latter two were indicted during their presidencies, along with Omar al-Bashir who has not yet been prosecuted.

The Protocol's immunity provision also challenges the second prong of CIL formation – *opinio juris*. It undermines claims that states are acting out of a sense of legal obligation in prohibiting official immunity. The provision may also represent an attempt to utilize the rules of persistent objection in CIL,⁵⁸ which would exempt parties to the Protocol.

This provision undermines the conventional justice cascade account of ever-expanding prosecutions, while the traditional model of immunity for states and officials recedes. While the immunity provision does not impact the jurisdiction of other ICL courts, it makes explicit the de facto immunity that already exists for more powerful states in ICL.⁵⁹ The drafters likely included greater protections in the Protocol due to the dramatic expansion of criminal liability. The provision has blinded commentators from considering

⁵⁵ See, 'Vienna Convention on the Law of Treaties,' 1155 UNTS 331 (23 May 1969), art. 38 (treaty norm becomes binding on nonparties when the norm is CIL) [hereinafter 'VCLT'].

⁵⁶ See, Restatement (Third) of Foreign Relations Law (1987), sec. 102(2).

⁵⁷ See, e.g., 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal,' 82 UNTS 280 (8 August 1945); 'Charter of the International Military Tribunal for the Far East,' TIAS No. 1589 (19 January 1946).

⁵⁸ The only way CIL is nonbinding is if a state persistently objects to the emergence of the rule at the time of formation. See, VCLT.

⁵⁹ See, Sirleaf, *supra* n 6.

how regionalization of ICL could potentially uniquely position regional mechanisms in the justice cascade.

B. THE JUSTICE CASCADE AND THE DEVELOPMENT OF THE RCC

The African continent has been fertile ground for accountability experimentation since the 1990s, with approaches ranging from judicial to non-judicial mechanisms like truth commissions, reparations and community-based processes. This section focuses on the plethora of judicial institutions that have flourished and situates the RCC as part of the turn to criminal trials across the Continent to address mass violence. The increasing resort to domestic, hybrid and international criminal trials set the stage for the RCC. This section highlights the challenges experienced in the justice cascade, which the RCC could potentially help address.

1. Domestic Trials

The African 'justice cascade' includes domestic trials. The purported benefits of national trials include providing greater accountability, restoring decimated legal systems, producing quicker results and including local sentiments regarding punishment.⁶⁰ This subsection examines Rwanda's and Côte d'Ivoire's experiences with domestic trials.

After the Rwandan Patriotic Front (RPF) army came to power, it arrested and detained those suspected of committing genocide and serious violations of ICL. The international community expressed concerns with the hundreds of thousands of people

⁶⁰ José E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda,' *Yale Journal of International Law* 24(2) (1999): 365–483.

imprisoned while awaiting trial. Further, it considered Rwanda's trials as a way for the government to intimidate its political opponents.⁶¹ The trials exposed the weakness of the country's judicial system following the conflict.

Rwanda searched for an alternative accountability process and instituted *gacaca* to alleviate prison overcrowding and to assist with societal reconstruction. *Gacaca* was a mechanism used in precolonial Rwanda to adjudicate communal disputes often linked to property issues, personal injury or inheritance problems. In the early 2000s, the Rwandan legislature adopted a modernized version, which established *gacaca* jurisdictions. Per the government, *gacaca* facilitated truth telling, promoted reconciliation, eradicated impunity and demonstrated Rwanda's ability to address its own problems. With an estimated 12,000 community-based courts and 169,000 judges,⁶² *gacaca* accelerated trials that overwhelmed the formal judicial system. In 2012, *gacaca* concluded with almost two million genocide-related cases tried.⁶³ The entire process reportedly cost US\$48.5 million,⁶⁴ which is a fraction of the cost of the ad hoc tribunal for Rwanda.

Commentators disparaged *gacaca* for failing to meet international fair trial standards.⁶⁵ They were concerned that *gacaca* provided inadequate guarantees for impartiality, defense and equality before the law, especially because most who were ultimately tried were ethnic Hutus or dissidents. *Gacaca* had uneven results facilitating

⁶¹ Alison des Forges and Timothy Longman, 'Legal Response to Genocide in Rwanda,' in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004).

⁶² Gacaca Community Justice, 'Achievements,' <http://gacaca.rw/about/achievements/> (accessed 13 December 2016).

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ See, e.g., Susan Thomson, 'The Darker Side of Transitional Justice: The Power Dynamics behind Rwanda's *Gacaca* Courts,' *Africa* 81(3) (2011): 373–390.

justice and reconciliation in some communities.⁶⁶ The limitations of national trials and community-based justice mechanisms in Rwanda paved the way for greater experimentation.

In Côte d'Ivoire, following the postelection violence of 2010 that left 3,000 people dead, the government established accountability mechanisms. In 2011, it created a temporary body to conduct investigations into violent crimes, economic crimes and attacks on state security.⁶⁷ In 2013, this was transformed into a permanent institution. The investigations led to limited trials that have targeted supporters of the former president, Laurent Gbagbo.⁶⁸ Domestic trials in Côte d'Ivoire have also experienced structural and financial issues, which have hindered cases from moving forward.⁶⁹ Moreover, the lopsided nature of indictments focusing on one group has undermined the credibility of the process. The ICC also began cases at Côte d'Ivoire's request in 2013,⁷⁰ against Charles Blé Goudé, an ally of the former president, and against the former first lady, Simone Gbagbo. Yet the government has refused to transfer the latter to the ICC, preferring to prosecute her domestically.⁷¹

Rwanda's and Côte d'Ivoire's challenges with mounting national prosecutions centered on capacity constraints and lack of political will. These experiences, especially

⁶⁶ See, Phil Clark, 'The Rules (and Politics) of Engagement: The Gacaca Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda,' in *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and beyond*, ed. Philip Clark and Zachary Kaufman (New York: Columbia University Press, 2009).

⁶⁷ International Center for Transitional Justice (ICTJ), *Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire* (April 2016).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See, *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Pre-Trial Chamber III (23 November 2011).

⁷¹ ICTJ, *supra* n 67.

the failure to meet international fair trial standards, indicate the key limitations of domestic trials. The national processes discussed above spurred the AU to create a permanent regional court as opposed to relying on the judiciaries of individual states. The success that African states had with hybrid courts also influenced this move.

2. Hybrid Courts

The African 'justice cascade' includes the utilization of hybrid courts aimed at counteracting the culture of impunity. They typically have foreign and domestic judges and personnel sharing experiences. Hybrid courts also incorporate a blend of international and domestic law. They are perceived as improving on purely domestic processes because of the typically damaged state of the judiciary following a conflict or period of authoritarian rule. The additional human and material resources that accompany hybrid courts help to bolster what might otherwise be fledgling national processes. This subsection examines Sierra Leone's and Senegal's experiences with hybrid courts. It also highlights the proposed courts in South Sudan and the Central African Republic (CAR).

Sierra Leone's hybrid court⁷² followed a period of protracted civil war. The government requested the UN to create a court to try the main rebel group.⁷³ Instead, the UN created the Special Court for Sierra Leone (SCSL) to prosecute *all* persons 'who bear

⁷² The Special Court for Sierra Leone coexisted with a truth commission. For further discussion, see, Matiangai Sirleaf, 'Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia,' *Florida Journal of International Law* 21(2) (2009): 209–285.

⁷³ See, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission Vol. 3B,' 2004, <http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf> (accessed 13 December 2016) (citing Letter from Alhaji Dr. Ahmad Tejan Kabbah, President of Sierra Leone, to Kofi Annan, Secretary General of the United Nations, 12 June 2000).

the greatest responsibility' for violations of ICL and Sierra Leonean law.⁷⁴ Notably, the SCSL also sat where the war crimes occurred for its proceedings to be more impactful. Of the 13 individuals initially indicted by the SCSL, nine are currently serving sentences ranging from 15 to 50 years, including the high-profile sentence of former Liberian president Charles Taylor.

The SCSL's jurisprudence is notable for rendering the first judgment for the crime of recruiting and using child soldiers in hostilities,⁷⁵ securing the first conviction for 'forced marriage' as a crime against humanity⁷⁶ and the first conviction treating 'attacking peacekeepers' as a war crime.⁷⁷ The SCSL is also recognized for contributing to democratic consolidation, peacebuilding and reducing the culture of impunity.⁷⁸

Yet, the Court's limited approach has meant that mid- and lower-level officials who directly and visibly perpetrated abuses have not been tried. Additionally, commentators have criticized the SCSL for paying insufficient attention to capacity building. Moreover, the SCSL lost an opportunity to shape national jurisprudence by failing to bring any charges under Sierra Leonean law.⁷⁹ Notwithstanding these limitations, Sierra Leone's experience has served as a model for others.

⁷⁴ See, 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone,' 2178 UNTS 137 (16 January 2002).

⁷⁵ See generally, *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-2004-16-A, Appeals Judgment (22 February 2008).

⁷⁶ See generally, *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber Judgment (2 March 2009).

⁷⁷ *Ibid.*

⁷⁸ See, Matiangai Sirleaf, 'Beyond Truth and Punishment in Transitional Justice,' *Virginia Journal of International Law* 54(195) (2014): 223–294.

⁷⁹ See, Tom Perriello and Marieke Wierda, 'The Special Court for Sierra Leone under Scrutiny,' International Center for Transitional Justice (March 2006).

In Senegal, the AU instituted the Extraordinary African Chambers to prosecute former Chadian president, Hissène Habré. Belgium wanted to prosecute Habré, who was exiled in Senegal, for ICL violations. Senegal originally refused to extradite him to Belgium and contended that they lacked the power to prosecute him domestically.⁸⁰ A sub-regional court in West Africa held that Habré could only be prosecuted internationally because Senegal's courts lacked jurisdiction at the time.⁸¹ The ICJ also ordered Senegal to extradite Habré to Belgium, if it did not try him without delay.⁸² Senegal then amended its *ex post facto* laws and domesticated ICL to prosecute Habré through a special national chamber.⁸³

Habré was found guilty of all the charges against him in mid-2016, making him the first head of state to be personally convicted for rape.⁸⁴ Additionally, Habré is the first head of state to be convicted of crimes against humanity by the courts of another country. His trial is also the first African-led prosecution based on universal jurisdiction.⁸⁵ Moreover, his trial undermines claims that the AU is not serious about addressing ICL violations.

Moreover, African states have also considered the hybrid model in other contexts. For example, the peace agreement in South Sudan contains provision for a court to

⁸⁰ Murungu, *supra* n 3.

⁸¹ Frans Viljoen, *International Human Rights Law in Africa*, 2nd ed. (Oxford: Oxford University Press, 2012).

⁸² *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Summary of the Judgment, 2012/4 ICJ (20 July 2012).

⁸³ Murungu, *supra* n 3.

⁸⁴ Ruth Maclean, 'Chad's Hissène Habré Found Guilty of Crimes against Humanity,' *Guardian*, 30 May 2016.

⁸⁵ *Ibid.*

investigate ICL violations committed by both parties to the conflict.⁸⁶ The AU is similarly supporting this move. At the time of writing, efforts to establish the court in South Sudan had stalled. Political leaders expressed a desire to focus on a truth and reconciliation process modeled after South Africa's instead.⁸⁷

Additionally, the transitional government in the CAR passed legislation creating a hybrid court to adjudicate ICL crimes.⁸⁸ It would be integrated in the national judiciary and would apply the law and criminal procedure of the CAR. The hybrid court would also be composed of national and international judges and staff. This is the first hybrid court created where the ICC has ongoing investigations. At the time of writing, the move to establish the court was taking place in fits and starts.⁸⁹ There are real concerns about capacity, ongoing insecurity, the court's relationship with the ICC and ensuring the court's effectiveness.

Notwithstanding these concerns, African hybrid courts have proven to be more promising than purely domestic trials. Yet, the hybrid processes have also faced issues of inadequate capacity and insufficient political will. African states' experiences with these trials spurred the AU to create a permanent regional court as opposed to relying on the international community to create a hybrid institution or supporting separate institutions

⁸⁶ BBC News, 'African Union Announces South Sudan War Crimes Court,' 29 September 2015.

⁸⁷ Salva Kiir and Riek Machar, 'South Sudan Needs Truth, Not Trials,' *New York Times*, 7 June 2016. First Vice-President Machar disavowed the contents post-publication, but President Kiir stated that Machar was consulted.

⁸⁸ Géraldine Mattioli-Zeltner, 'Taking Justice to a New Level: The Special Criminal Court in the Central African Republic,' *Jurist*, 9 July 2015.

⁸⁹ See, Amnesty International, *South Sudan: Looking for Justice: Recommendations for the Establishment of the Hybrid Court for South Sudan* (13 October 2016).

across the Continent. The experience with ICL trials also influenced the AU's decision to create the RCC.

3. International Criminal Trials

The African 'justice cascade' includes ICL trials aimed at fostering greater accountability. The purported benefits of these trials include superior legal expertise for the development of ICL; less destabilization to fragile governments; less susceptibility to national politics; more impartiality; greater ability to investigate; more uniform justice; promotion and maintenance of international peace; and better credibility than national or hybrid processes.⁹⁰ This subsection discusses the International Criminal Tribunal for Rwanda (ICTR) and the ICC's experiences in Africa.

The UNSC acted under Chapter VII of the Charter to create the ICTR in 1994 to prosecute alleged perpetrators of genocide and other violations of ICL.⁹¹ The ICTR was plagued by charges of inefficiency,⁹² and ceased operating in 2015. It indicted 93 individuals with 61 resulting in convictions, while 14 individuals were acquitted, 10 referred to national jurisdictions for trial, three individuals died prior to trial, three fugitives remain at large and two indictments were withdrawn.⁹³ Notable sentences include one prime minister, four ministers and several others holding leadership positions. Yet, the ICTR did not prosecute anyone with connections to the Rwandan government for crimes

⁹⁰ Alvarez, *supra* n 60.

⁹¹ See, UN Charter. See also, ICTR Statute.

⁹² See generally, Des Forges and Longman, *supra* n 61.

⁹³ UN Mechanism for International Criminal Tribunals, 'The ICTR in Brief,' <http://unictr.unmict.org/en/tribunal> (accessed 13 December 2016).

allegedly committed by the RPF.⁹⁴ The Tribunal's dependence on the government for cooperation likely explains the reticence to implicate those with government ties. Yet the ICTR's actions legitimate RPF impunity at the international level,⁹⁵ leaving the court with a tenuous legacy.

Furthermore, during the ICTR's operation, there were numerous tensions between the Tribunal and Rwanda, with the government politicizing and hindering the work of the Tribunal. It objected to the primacy of the ICTR over Rwandan courts, the location of the Tribunal in Tanzania and the ICTR's decision to exclude the death penalty (prior to its abolishment in 2007).⁹⁶ Yet, besides the death penalty's abolishment and Rwanda's review of its genocide ideology law, the ICTR has not contributed to the development of Rwanda's judicial system.⁹⁷ Moreover, there is scant empirical evidence that it has contributed to peace and reconciliation in Rwanda.⁹⁸

Notably, a crucial component of the completion strategy of the ICTR included referral of cases to Rwanda. In 2010, the UNSC created an International Residual Mechanism for Criminal Tribunals, tasked with carrying out remaining functions of the ICTR, and the ad hoc tribunal for the former Yugoslavia.⁹⁹ Compounding the perceived bias of ICL trials in Rwanda, the Residual Mechanism does not have jurisdiction to bring

⁹⁴ Reportedly, the RPF killed at least 25,000 to 30,000 people, including civilians. Alison des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999).

⁹⁵ Sara Kendall and Sarah Nouwen, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda,' *American Journal of International Law* 110(2) (2016): 212–232.

⁹⁶ Des Forges and Longman, *supra* n 61.

⁹⁷ Kendall and Nouwen, *supra* n 95.

⁹⁸ *Ibid.*

⁹⁹ S.C. Res. 1966 (22 December 2010).

charges against the RPF.

Notwithstanding the above, it is uncontested that the ICTR established a historical record and contributed to the development of ICL. For instance, it set important legal precedents, including the recognition of rape as a means of perpetrating genocide.¹⁰⁰ It was also the first ICL court to enter a judgment for genocide and, since Nuremberg, to issue a judgment against a former head of state.¹⁰¹ The ICTR contributed to the solidification of the justice cascade and the privileging of criminal trials over alternative conceptions of justice.

This helped to pave the way for the creation of the ICC as a permanent global institution, which informed the RCC's development. African states form the biggest regional bloc to the ICC, with 34 states parties out of 124.¹⁰² Almost all the ICC's current situations involve Africans: the Democratic Republic of Congo (DRC), the CAR, Uganda, the Darfur region of Sudan, Kenya, Libya, Côte d'Ivoire and Mali.¹⁰³ Five of these situations were the result of 'self-referrals' by the countries for investigations.¹⁰⁴ These states have had a tendency of referring politically troublesome cases to the ICC even where

¹⁰⁰ See, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998).

¹⁰¹ See, UN Mechanism for International Criminal Tribunals, 'ICTR Milestones,' <http://www.unmict.unict.org/en/ictr-milestones> (accessed 13 December 2016).

¹⁰² ICC, 'The States Parties to the Rome Statute,' https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 13 December 2016).

¹⁰³ The ICC prosecutor opened an investigation in Georgia in January 2016. See, ICC, 'Situations under Investigation,' http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx (accessed 13 December 2016).

¹⁰⁴ The five self-referrals are the DRC, the CAR, Uganda, Côte d'Ivoire and Mali. See, *ibid.* See also, Rome Statute, art. 14, providing for self-referrals.

they could conduct the prosecutions themselves. Self-referring governments have used the ICC for strategic aims to ‘delegitimize and incapacitate [political] enemies.’¹⁰⁵ These states have appeared to be cooperating while undermining the ICC’s ability to be effective.¹⁰⁶

Further, the ICC has been unable to disentangle itself from geopolitics. For example, three P5 members on the UNSC have not ratified the Rome Statute.¹⁰⁷ They can veto any referral to the ICC, effectively immunizing themselves and their allies from any potential prosecutions. Moreover, the UNSC’s referral of the Sudanese and Libyan situations provided immunity from prosecutions for non-state parties to the ICC that contributed peacekeepers in either country.¹⁰⁸ This suggests a hierarchy of impunity based on the nationality of individuals that perpetrated the crimes. Indeed, the UNSC’s Sudanese and Libyan referrals risk turning the ICC into a diplomatic tool. Accordingly, the ICC has been charged with ignoring blatant human rights violations perpetrated by P5 members or their allies¹⁰⁹ in selecting its situations.

Some commentators charge the ICC with contributing to neo-imperialism, as the

¹⁰⁵ Sarah Nouwen, ‘The International Criminal Court: A Peacebuilder in Africa?’ in *Peacebuilding, Power, and Politics in Africa*, ed. Devon Curtis and Gwinyayi A. Dzinesa (Athens, OH: Ohio University Press, 2012), 187.

¹⁰⁶ For a discussion of Kenya’s strategy of noncompliance with the ICC, see, Victor Peskin, ‘Things Fall Apart: Battles of Legitimation and the Politics of Noncompliance and African Sovereignty from the Rwanda Tribunal to the ICC’ (draft on file with author).

¹⁰⁷ ICC, *supra* n 102. Note the omission of Russia, China and the US.

¹⁰⁸ See, S.C. Res. 1593, para. 6 (31 March 2005). See also, S.C. Res. 1970, para. 6 (26 February 2011).

¹⁰⁹ See, e.g., Ifeonu Eberechi, “‘Rounding up the Usual Suspects’: Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union’s Emerging Resistance,’ *African Journal of Legal Studies* 4(1) (2011): 51–84.

Court is perceived as just another means used by the West to control Africa.¹¹⁰ In 2009, the AU decided that states should not cooperate with ICC prosecutions.¹¹¹ Yet, African states' views regarding noncooperation with the ICC are not monolithic. Indeed, some, like Botswana and Malawi, have signalled displeasure with the AU's call for non-cooperation.¹¹² Yet, in early 2016, Kenya received support at an AU meeting for mass state withdrawal from the ICC.¹¹³ Recently, Burundi, South Africa and the Gambia formally announced their intentions to withdraw from the ICC.¹¹⁴ The ICC's failure to adequately manage this crisis has undermined it. The current strained relationship is deeply problematic for the larger justice project, as the ICC's effectiveness is completely dependent on states.

The above challenges to the ICC are due to several factors. One aspect impacting the ICC's credibility is its issuing of indictments during the midst of conflicts.¹¹⁵ The Uganda situation illustrates this concern, with some commentators perceiving the Court's

¹¹⁰ See, e.g., David Chuter, 'The ICC: A Place for Africans or Africans in Their Place?' in *Africa and the Future of International Criminal Justice*, ed. Vincent Nmeielle (The Hague: Eleven International Publishing, 2012).

¹¹¹ See, 'Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal,' Assembly/AU/Dec. 245(XIII) Rev.1 (1 July 2009), deciding that member states 'shall not cooperate...in the arrest and surrender of President Omar al-Bashir of Sudan'.

¹¹² See, e.g., 'Decision on International Jurisdiction, Justice and the International Criminal Court,' Assembly/AU/Dec.482(XXI) (27 May 2013), noting Botswana's reservation 'Malawi Monitoring ICC Withdrawals,' *Malawi24*, 25, October 2016, <https://malawi24.com/2016/10/25/malawi-monitoring-icc-withdrawals/> (accessed xx December 2016).

¹¹³ Agence France-Presse, 'African Union Members Back Kenyan Plan to Leave ICC,' *Guardian*, 1 February 2016.

¹¹⁴ Fletcher Simwaka, 'Africa's Retreat from International Criminal Court Is about Impunity, Not Dignity,' *Washington Post*, 8 November 2016.

¹¹⁵ Stoett, supra n 24, discusses ICC timing as counterproductive to ensuring stability in Uganda or undermining peace efforts in Sudan.

indictments against rebel leaders as an incentive for them to remain fighting.¹¹⁶ Others question how committed the rebels previously were to negotiations and have argued for a more holistic approach to how the ICC facilitates peace.¹¹⁷

Additionally, the ICC's inability to apprehend suspects further weakens it.¹¹⁸ The indictment of Sudan's president, al-Bashir, one of the Court's most high-profile cases, exemplifies this. He is the first head of state to be reelected following an international arrest warrant. His reception in China, Qatar, Saudi Arabia and some African states following the ICC's indictment also highlights the Court's lack of influence.¹¹⁹ The UNSC also failed to enforce six-year arrest warrants by taking coercive measures under its Chapter VII powers. In late 2014, the ICC conceded its ineffectualness in this case when the prosecutor suspended the Darfur investigations.¹²⁰

Moreover, the ICC's credibility is reduced because some commentators perceive it as embroiling itself in local politics.¹²¹ This occurs when it issues one-sided indictments

¹¹⁶ Steven C. Roach, 'Multilayered Justice in Northern Uganda: ICC Intervention and Local Procedures of Accountability,' in *The Realities of International Criminal Justice*, ed. Dawn L. Rothe, James Meernik and Thordis Ingadóttir (Leiden: Martinus Nijhoff, 2013).

¹¹⁷ Janine Natalya Clark, 'Peace, Justice and the International Criminal Court,' in *Africa and the Future of International Criminal Justice*, ed. Vincent Nmeielle (The Hague: Eleven International Publishing, 2012).

¹¹⁸ Dawn L. Rothe and Victoria E. Collins, 'The International Criminal Court: A Pipe Dream to End Impunity?' in *The Realities of International Criminal Justice*, ed. Dawn L. Rothe, James Meernik and Thordis Ingadóttir (Leiden: Martinus Nijhoff, 2013).

¹¹⁹ For a discussion on Chad and Kenya hosting al-Bashir, despite their obligations to arrest him as state parties to the ICC, see, e.g., Peskin, *supra* n 106. For a discussion on South Africa's inaction despite its obligations under the ICC and a domestic court order to prevent al-Bashir from leaving, see, Editorial Board, 'South Africa's Disgraceful Help for President Bashir of Sudan,' *New York Times*, 15 June 2015. See, Agence France-Presse, 'Omar al-Bashir Celebrates ICC Decision to Halt Darfur Investigation,' *Guardian*, 14 December 2014, for a discussion on his travel to Egypt and Ethiopia.

¹²⁰ David Smith, 'ICC Chief Prosecutor Shelves Darfur War Crimes Probe,' *Guardian*, 14 December 2014.

¹²¹ Stoett, *supra* n 24.

in situations where the government is also implicated in abuses. For example, in the DRC the ICC issued indictments against militia leaders, but not any officials in the army, even though they are believed to be implicated in grave abuses.¹²² The ICC duplicated this in Côte d'Ivoire, where only government opponents were indicted, despite allegations that all sides were implicated in abuses.¹²³

Another example of the Court's immersion in local politics is the Kenya situation. The ICC indicted six individuals for their alleged involvement in postelection violence that took place in Kenya in 2007/2008.¹²⁴ Yet, the ICC did not indict the former prime minister and president who are arguably the individuals most responsible for actions taken by their subordinates.¹²⁵ Strikingly, Kenya's current president, Uhuru Kenyatta, and the deputy president, William Ruto, were elected following an ICC indictment.¹²⁶ In 2013, three of the six Kenyan cases were dismissed for lack of evidence.¹²⁷ The ICC's high-profile cases against Kenyatta and Ruto also collapsed in December 2014 and April 2016, respectively, due to insufficient evidence.¹²⁸ All of the above is not lost on the domestic populace and affects the perceived legitimacy of the ICC.¹²⁹

¹²² Rothe and Collins, *supra* n 118.

¹²³ Human Rights Watch, 'ICC/Côte d'Ivoire: Gbagbo to Go to Trial,' 12 June 2014.

¹²⁴ 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,' Case No. ICC-01/09 (31 March 2010).

¹²⁵ Rothe and Collins, *supra* n 118.

¹²⁶ *Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11, Pre-Trial Chamber II (23 January 2012).

¹²⁷ Peskin, *supra* n 106.

¹²⁸ See, e.g., Anna Holligan, 'Uhuru Kenyatta Case: Most High-Profile Collapse at ICC,' *BBC News*, 5 December 2014; Marlise Simons and Jeffrey Gettleman, 'International Criminal Court Drops Case Against Kenya's William Ruto,' *New York Times*, 5 April 2016.

¹²⁹ Rothe and Collins, *supra* n 118.

The experience with ICL trials led by the ICC and the ICTR has left much to be desired. The anticipated benefits of more uniform justice as well as the promotion and maintenance of international peace have not lived up to expectations. ICL trials generally focus on individual cases and not on the complex relationships that exist between individuals, groups, institutions and other entities that make ICL violations possible.¹³⁰ In the effort to move away from collectivizing guilt, which may lead to further violence, ICL trials often tend to absolve states, corporations, groups, institutions, bystanders and society of responsibility, as if individuals committed massive violations in a vacuum. ICL trials tend to focus on establishing individual accountability for a small number of crimes, which may present the opportunity for many criminal participants, including corporations, 'to rationalize or deny their own responsibility for crimes.'¹³¹ As such, ICL trials are not aimed at determining the 'truth,'¹³² but instead focus on whether a criminal standard of proof has been met, based on the limited charges brought and the individuals indicted.

The RCC's emergence seeks to disrupt some of this baggage associated with ICL trials. While not eliminating the history-distorting tendencies of ICL, the RCC expands the justice cascade due to its ability to prosecute crimes that other ICL courts do not cover. Moreover, the RCC's provision for corporate criminal liability may advance the already limited ability of ICL trials to establish an accurate historical record. This would increase

¹³⁰ Sirleaf, *supra* n 78.

¹³¹ Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,' *Human Rights Quarterly* 24(3) (2002): 601.

¹³² Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,' *Harvard Human Rights Journal* 15 (2002): 39-98.

the credibility of such trials, even if minimally. The section below discusses the potential for regionalizing criminal justice.

C. REGIONALISM AND THE EMERGENCE OF THE RCC

Regional criminal justice adds greater significance to the justice cascade. Regional systems benefit from states with greater socioeconomic, environmental and security interdependence, because this encourages greater compliance with the decisions of regional bodies.¹³³ This section discusses the benefits of a regional approach at a theoretical level, the RCC as gap-filler, potential context-specific remedies and procedure, as well as the prospects for norm promotion.

1. Regional Approach

Scholars have argued convincingly that regional problems of criminality deserve regional approaches.¹³⁴ A regional approach is useful where regional conflicts and insecurity tend to spread.¹³⁵ A regional approach recognizes the interconnectedness of states, and regional institutions can be created with mandates which do not ignore these dynamics. A regional court's jurisdiction could be based on the reality of conflict lines, both territorially and temporally. Prosecutions could examine all aspects of criminality including the

¹³³ George William Mugwanya, 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System,' *Indiana International and Comparative Law Review* 10(1) (1999): 35–50.

¹³⁴ See, e.g., Charles C. Jalloh, 'Regionalizing International Criminal Law?' *International Criminal Law Review* 9(3) (2009): 445–499; William A. Schabas, 'Regions, Regionalism and International Criminal Law,' *New Zealand Yearbook of International Law* 4 (2007): 3–23.

¹³⁵ Sirleaf, *supra* n 72.

transnational nature of abuses, perhaps limiting problems posed by lopsided investigations. A regional approach makes sense because the peace and security implications are often greatest within the region where massive crimes occur.

Moreover, a regional approach could also limit the difficulties of determining competing claims. A regional body could circumvent situations where several states have a keen interest in exercising jurisdiction, and where one state's exercise of jurisdiction inevitably frustrates the aspiration of other state(s).¹³⁶ It also enhances victims' rights by not attempting to adjudicate which society has the most valid claim.¹³⁷ A regional approach could also ameliorate double-jeopardy concerns raised by the possibility of multiple prosecutions from different states. In sum, there are numerous theoretical benefits to regional criminal justice.

2. RCC as Gap-Filler

The AU's decision to create the RCC was influenced by the desire to improve upon the continent's experience with ICL trials. The RCC could help to serve as an intermediary between domestic institutions which violate or fail to enforce human rights, and the international system which alone cannot provide redress to individuals. The creation of the RCC may allow the ICC to concentrate on the most severe situations. This would allow the ICC to dedicate its limited resources more effectively. The ICC will never be able to deal with all situations involving ICL. Moreover, where the ICC does operate, the issuance of

¹³⁶ See, Arrest Warrant Case.

¹³⁷ Frédéric Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice,' *Cornell International Law Journal* 38(3) (2005): 725-751.

lopsided indictments means that a criminality gap will persist. Further, while the RCC cannot compensate for failures in domestic capacity, it is nonsensical to forego action at the regional level until or unless domestic or hybrid institutions are strengthened or created. The RCC could theoretically help to fill this gap by prosecuting situations that the ICC and national and hybrid institutions are not, by investigating quotidian crimes these institutions do not cover and by indicting individuals and entities that these institutions have not or cannot.

There are numerous ways the RCC could fill justice gaps. First, due to the existence of geographic, historical and cultural bonds among states, decisions of regional bodies may meet with less resistance than global bodies.¹³⁸ Because the court is linked to the regional political bodies of the AU, this may facilitate stricter oversight. For example, the AU has intervened in the Darfur, Sudan, in Burundi and in Somalia. The AU has also suspended Mauritania and Togo from membership for unconstitutional changes of government.¹³⁹ While intervention and suspension of membership are not synonymous with ICL accountability, they evidence that in theory and in practice the AU can challenge sovereignty and the principle of noninterference when sufficient political will exists. Other relevant regional bodies that may assist with compliance include the Panel of the Wise and the Peace and Security Council.

¹³⁸ Chaloka Beyani, 'Reconstituting the Universal: Human Rights as a Regional Idea,' in *The Cambridge Companion to Human Rights Law*, ed. Conor Gearty and Costas Douzinas (Cambridge: Cambridge University Press, 2012).

¹³⁹ Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect,' *Journal of African Law* 53(1) (2009): 1–33.

Yet, regional embeddedness will not fully address issues of noncompliance.¹⁴⁰ For example, the AU has been notoriously silent about violations taking place in countries with influential or revered leaders. The RCC could be subject to the same criticisms leveled against the ICC for lack of sufficient independence from the UNSC, but this time with respect to AU political bodies. Yet cooperation, even if *de minimus*, would not be insignificant because the lack of global or regional police power necessitates that supranational institutions use shaming and moral suasion to change the behavior of nonconforming states. These strategies may be more effective regionally where states are in constant contact.¹⁴¹

3. Remedies and Procedure

Regional bodies may also be better placed to respond to ICL violations because of their ability to develop more familiar systems of redress. In addition to imposing sentences and forfeiture of any property following a conviction, the RCC is empowered to provide compensation and reparation to victims.¹⁴² The Protocol also provides a trust fund for victims for legal aid and assistance. While the ICC has similar provisions,¹⁴³ the RCC may be better placed to fashion remedies that resonate. For instance, if the RCC follows the lead of the Inter-American Court of Human Rights in fashioning remedies, it might order

¹⁴⁰ For a discussion of difficulties securing cooperation with the ICTR and SCSL, see, George William Mugwanya, 'International Criminal Tribunals in Africa,' in *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights*, ed. Manisuli Ssenyonjo (Leiden: Nijhoff, 2012).

¹⁴¹ Mugwanya, *supra* n 140.

¹⁴² Malabo Protocol.

¹⁴³ Rome Statute, arts. 68 (victim's representatives), 75 (reparations for victims), 79 (trust fund for victims).

communal reparations,¹⁴⁴ or formulate broad reparative measures.¹⁴⁵ It could require that states end violations through formulating specific policies and programs.¹⁴⁶ The RCC might also develop something akin to the margin of appreciation doctrine used by the European Court of Human Rights,¹⁴⁷ to avoid determining issues where there is regional diversity on ICL issues.¹⁴⁸ Additionally, the Court could seek to work with other structures in the AU, such as the Peace Fund or the Post-Conflict Reconstruction and Development Framework, to provide redress.

Further, the RCC may be better equipped to account for variations in procedural traditions.¹⁴⁹ For example, the Court might even require a convicted defendant to participate in local reconciliatory procedures akin to *gacaca* as a means of securing reparations to victims. It is premature to determine how broadly the Court will construe its provisions. Yet the potential flexibility could be an improvement on the 'imagined victims' of ICL that always demand retributive justice and support trials unquestionably. Instead, victims have diverse desires for redress.¹⁵⁰ This is particularly important in some communities where justice is conceptualized in terms of communal restoration,

¹⁴⁴ See, e.g., *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 146 (29 March 2006).

¹⁴⁵ Thomas M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice,' *Stanford Journal of International Law* 47(2) (2011): 279–332.

¹⁴⁶ See, e.g., *Miguel Castro Prison v. Peru, Merits, Reparations and Costs Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 160 (25 November 2006).

¹⁴⁷ The doctrine allows for differences in how rights are implemented nationally. See, e.g., Paul L. McKaskle, 'The European Court of Human Rights: What It Is, How It Works, and Its Future,' *University of San Francisco Law Review* 40(1) (2005): 1–84.

¹⁴⁸ Schabas, *supra* n 134.

¹⁴⁹ *Ibid.*

¹⁵⁰ Laurel E. Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court,' in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian de Vos, Sara Kendall and Carsten Stahn (Cambridge: Cambridge University Press, 2014).

interpersonal forgiveness and reconciliation, and a redistributive, rather than retributive, process. Thus, the RCC may embody the mantra of 'African solutions to African problems.'

4. Norm Promotion

Like the hybrid courts, the RCC's proximity to those affected could increase the likelihood of norm promotion.¹⁵¹ It is also conceivable that the RCC may be similarly remote from impacted communities like the ICTR or the ICC and this could influence its effectiveness and perceived legitimacy and credibility. However, the RCC may serve as a platform for positive complementarity – as a resource for hybrid and domestic efforts at prosecuting ICL violations in Africa. The RCC could provide guidelines for regional best practices and help to strengthen domestic and hybrid efforts adjudicating ICL.

Yet, regionalization of ICL could result in a 'race to the bottom,' with countries seeking lower barriers to entry. That is, instead of states deciding to bind themselves to higher obligations, they can seek to lower their obligations. For example, irrespective of what CIL provides as a background norm,¹⁵² the immunities provision is in stark contrast to the trend for ICL tribunals not to grant official immunity. As such, it may be that the flexibility provided by regionalization is undesirable, given the need to maintain certain baselines in the justice cascade.

¹⁵¹ For a discussion on how regional organizations are better at persuading states because of local knowledge and proximity, see, Paul D. Williams, 'Regional and Global Legitimacy Dynamics: The United Nations and Regional Arrangements,' in *Legitimizing International Organizations*, ed. Dominik Zaum (Oxford: Oxford University Press, 2013).

¹⁵² Sirleaf, *supra* n 6.

The RCC's innovation in the quotidian and crisis crimes covered, as well as the range of actors that can be held liable, may also push the boundaries of ICL in a much-needed direction, especially if other states mimic these provisions. For example, the RCC could allow for greater coordination on the regulation of corporate activity, and allow states to respond more effectively to the challenges posed by large corporations. The RCC's provision for corporate criminal liability puts pressure on the prevailing legal landscape both within and outside of Africa. These doctrinal innovations are much needed to render the justice cascade more germane.

Moreover, there is already some evidence that regional human rights bodies are beginning to address ICL issues outside of Africa.¹⁵³ For example, the quasi-criminal review of the Inter-American Court goes beyond the Court's strictly human rights mandate.¹⁵⁴ The Inter-American Court innovated by construing prosecutions for ICL violations as an equitable remedy to human rights violations.¹⁵⁵ This is noteworthy when one considers that 'no state has ever fully complied with an Inter-American Court order to prosecute or punish an international crime.'¹⁵⁶ The African system is improving on this innovation by seeking to adjudicate both ICL violations and systematic quotidian crimes regionally. Both regions indicate that the expansion of the sphere of influence of regional human rights bodies to encompass ICL issues is a phenomenon that is not fleeting.

¹⁵³ See generally, Alexandra Huneus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts,' *American Journal of International Law* 107(1) (2013): 1–44.

¹⁵⁴ Statute of the Inter-American Court of Human Rights, Res. No. 448 (October 1979). See also, Huneus, *supra* n 153, noting the Court's supervision of prosecutions, which has not been without controversy.

¹⁵⁵ Huneus, *supra* n 153.

¹⁵⁶ *Ibid.*, 15.

CONCLUSION

In sum, the Malabo Protocol provides potentially more contextually tailored solutions than previously provided at the international level, by criminalizing conduct that is regionally salient and expanding the actors that can be held liable to include corporations. The Protocol also seeks to improve upon inefficiencies in the justice cascade that exist from relying on the domestic judiciary of member states, or the creation of hybrid courts. Yet, the Protocol's provision for official immunity, while allowed under CIL, may still be an undesirable retraction of the justice cascade. If established, the RCC may face familiar challenges marshaling political will and resources to carry out prosecutions. Yet with all its imperfections, it represents an attempt by African states to offer an alternative vision of regional criminal justice that perhaps is better suited to Africa's realities and aspirations.